

# School Requirements Under Title IX

TRISH ANDREWS

ANDREWS & PRICE, LLC

# Title IX Regulations

- ▶ What will we discuss today:
  - ▶ What Is Title IX
  - ▶ Requirements under Title IX
  - ▶ Responsibilities of the District and School Personnel
  - ▶ Effective Implementation

## Title IX:

- ▶ “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”  
20 U.S.C. § 1681 (a) .

# Final Regulations

- ▶ Issued on May 6, 2020 by the U.S. Department of Education
  - ▶ Main focus is not on sports – but to address sexual assault and sexual harassment in schools
  - ▶ Regulations set forth specific requirements for how recipients of federal funds (school districts) **must** respond to allegations of sexual harassment and sex discrimination

# 2022 Proposed Amendments

- ▶ U.S. Department of Education has issued proposed changes to these Final Regulations
  - ▶ Stated purpose is to strengthen the rights of students who are victims of sex discrimination
  - ▶ Protect LGBTQ+ students' rights
- ▶ Proposed Amendments are in the public comment phase
  - ▶ Not yet effective

# School District Obligations Under Title IX

- ▶ A School is required to respond whenever any employee has **actual knowledge** or notice of sexual harassment or allegations of sexual harassment
  - ▶ Prior OCR Guidance required schools to respond promptly and effectively if the school **knew or should have known** about sexually harassing behavior

# School's Obligation Under Title IX

- ▶ A District's response to known sexual harassment may not be deliberately indifferent
  - ▶ A school acts with deliberate indifference when it responds to sexual harassment in a manner that is "**clearly unreasonable in light of the known circumstances**"

# Liability under Title IX

- ▶ Liability is premised on:
  - ▶ Actual knowledge of harassment
  - ▶ Deliberate choice to fail to appropriate address the situation



# Definition of Sexual Harassment

- ▶ (1) Quid Pro Quo harassment: An employee of the recipient conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct
- ▶
- ▶ (2) Unwelcome conduct that a reasonable person would find to be **so severe, pervasive, and objectively offensive** that it **effectively denies a person equal access to the school's education program or activity**; or
- ▶
- ▶ (3) Sexual assault, dating violence, domestic violence, or stalking
  - ▶ Are not subject to the “severe pervasive and objectively offensive” standard
- ▶

# Additional Definitions

10

**Sexual Assault** – “any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent”

**Dating Violence** - Dating violence means violence committed by a person: **A. who is or has been** in a social relationship of a romantic or intimate nature with the victim, and **B.** where the existence of such a relationship shall be determined based on a consideration of the following factors:

- i. The length of the relationship
- ii. The type of relationship, and
- iii. The frequency of interaction between the persons involved in the relationship.

# Additional Definitions

- ▶ **Domestic Violence** – “felony or misdemeanor crimes of violence committed by a
  - ▶ Current or former spouse or intimate partner of the victim,
  - ▶ Person with whom the victim shares a child in common,
  - ▶ Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
  - ▶ Person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - ▶ Any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction”

# Additional Definitions

- ▶ **Stalking** – “engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - ▶ A. fear for his or her safety or the safety of others; or
  - ▶ B. suffer substantial emotional distress”

# Other Key Terms

- **Complainant** – individual who makes complaint of Title IX Incident (formerly alleged victim)
- **Respondent** – individual who is accused of committing Title IX Incident (formerly alleged perpetrator)
- **Recipient** – Recipient of federal funds who Title IX applies to; will be used interchangeably with “school” or “entity”

# Jurisdictional Obligations

- ▶ School's obligations under Title apply in or during "locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs"
- ▶ If the respondent (student or employee) leaves or is no longer with the District, Title IX does not apply

# Mandatory Reporters

- ▶ DO NOT FORGET ROLE AS MANDATORY REPORTER
  - ▶ Report to Police and CYD acts of suspected or known child abuse
  - ▶ Even if they occur outside of school

# Reports of Sexual Harassment

- ▶ Any person may report sex discrimination
  - ▶ Regardless of whether the person reporting is the alleged victim
  - ▶ Can include a student, parent, friend or someone who witnessed the alleged harassment occur
- ▶ Reports can be made in person, by mail, telephone or emails



# Reports of Sexual Harassment

- ▶ Review Policy 103
  - ▶ Includes an Attached reporting form; but specifies that verbal reports are accepted and documented and that the policy still applies
  - ▶ Reports should initially be made to the Building Principal
    - ▶ If the Building Principal is the subject of the complaint, the individual reporting should report directly to the Title IX Coordinator
  - ▶ Building Principal shall promptly notify the Title IX Coordinator of all reports

# Reports of Sexual Harassment

18

- ▶ Title IX Coordinator Role
  - ▶ Contact complainant
  - ▶ Discuss supportive measures
    - ▶ Taking into consideration the wishes of the complainant
    - ▶ Offered whether complainant files formal complaint or not
  - ▶ Explain process
  - ▶ Explain filing formal complaint

## Supportive Measures

Nondisciplinary, nonpunitive individual services offered as appropriate, as reasonably available and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed

Designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the education environment or to deter sexual harassment

# Examples of supportive measures

20

- ▶ Counseling
- ▶ Extensions of deadlines or other course related adjustments
- ▶ Modifications of class work or schedules
- ▶ Campus escort services
- ▶ Mutual contact restrictions
- ▶ Changes in work locations
- ▶ Leaves of absence
- ▶ Increase security
- ▶ Monitoring of certain areas of campus
- ▶ Assistance from domestic violence or rape crisis programs
- ▶ Assistance from community health resources including counseling resources

## Supportive Measures

Can also include assessments or evaluations for special education or 504 services

Or review of current IEPs or 504 Plans

# Emergency Removal

Schools are authorized to remove a respondent from the school's education programs or activities on an **emergency basis**, with or without a grievance process pending, as long as notice and opportunity to challenge the removal is given to the respondent following the removal.

- Consider consultation with Solicitor prior to emergency removal under Title IX

The decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

An emergency removal may be appropriate when there is **an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment.**

Prior to the emergency removal, a school must

- Conduct an individualized safety and risk analysis
  - Must be more than a “generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety” and
  - Must be individualized with respect to the particular respondent and must examine the circumstances “arising from the allegations of sexual harassment”
- Determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

# Emergency Removal

# Informal Resolution Process

- No requirement that a school establish or offer an informal resolution process
- ▶ Not an available option for claims involving sexual harassment by an employee against a student
  
- It is available only if:
  1. A formal complaint has been filed;
  2. School determines that informal resolution is appropriate; AND
  3. Both parties provide fully informed, voluntary, written consent for informal resolution



# Informal Resolution Process

- A party can decide at any time before final determination to no longer proceed with the informal resolution process.
- ▶ Process is managed by an informal **resolution facilitator** who must be trained, unbiased and impartial
- **Not an option in cases involving an employee or other adult**

# Investigating Complaints

- ▶ Purpose of the Regulatory Revisions
  - ▶ Stress Due Process , including notice and a meaningful opportunity to be heard
  - ▶ Ensure the right to an impartial investigation before unbiased officials
  - ▶ Establish procedures to
    - ▶ Improve the perception that Title IX sexual harassment allegations are resolved fairly and reliably
    - ▶ Avoid intentional and unintentional sex-based stereotypes into Title IX proceedings; and
    - ▶ Promote accurate, reliable outcomes to protect from discriminatory practices

# Grievance Procedure

- ▶ Schools must develop a transparent grievance procedure that must:
  - ▶ Treat complainants equitably by providing remedies any time a respondent is found responsible
  - ▶ Treat respondents equitably by not imposing disciplinary sanctions without following the grievance process
  - ▶ Provide complainant with remedies designed to maintain equal access to education
  - ▶ Include an objective evaluation of all relevant evidence
  - ▶ Avoid credibility determinations based on a person's status as a complainant, respondent or witness
  - ▶ Require that Title IX personnel are free from conflicts of interest or bias

# Grievance Procedures

- ▶ Grievance process must:
  - ▶ Include training
  - ▶ Include a presumption that a respondent is not responsible for alleged conduct until a determination is made at the conclusion of the grievance process
  - ▶ Include a reasonably prompt time frame for conclusion of the grievance process

# Conducting the Investigation

- ▶ Title IX requires schools to investigate the allegations of any formal complaint and send written notice to both parties of the allegations upon receipt of the formal complaint

# Title IX Roles – Title IX Coordinator

- Title IX Coordinator is designated to ensure compliance with regulations and receive complaints
  - Monitor schools' compliance with Title IX
  - Ensure training is provided
  - Coordinate investigations and resolution of reports
  - Ensure appropriate actions to eliminate sexual harassment to prevent recurrence
  - Review efforts to ensure the educational setting is free from sexual harassment

# Title IX Coordinator

- Contacts each complainant to discuss supportive measures
- Considers the complainant's wishes regarding such measures
- Explains formal complaint process to complainant
- Treats complainants and respondents equitably
- Implement remedies where there is a founded case of sexual harassment
- May impose disciplinary sanctions

# Investigator

- Investigator is assigned by the Title IX Coordinator
  - Has received appropriate training
  - Impartial, unbiased and free from conflicts
  - Oversees prompt gathering of facts based on the filing of the formal complaint
  - Communicates with all participants throughout the investigation
  - Provides notice of any delays in processing the investigation
  - Understands “relevance” and “standard of proof” in order to create a report that summarizes relevant evidence



# Decision Maker

- Must understand how to accurately evaluate the relevant evidence
- Must use independent judgment
- Must be free from conflicts of interest, or bias for or against complainants or respondents and receive special training on impartiality
- Has received appropriate training

# Determine Standard of Proof

- ▶ School must choose standard of proof for claims”
  - ▶ Clear and Convincing Evidence: the evidence is highly and substantially more likely to be true than untrue
    - ▶ Higher standard than preponderance of the evidence, but less than beyond a reasonable doubt
  - ▶ Preponderance of the evidence: claims have a greater than 50% chance to be true
    - ▶ Lowest standard of proof
    - ▶ Recommended by PSBA

# Investigation Begins When Formal Complaint Filed

- ▶ Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
- ▶ “Document filed by a complainant” means a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

# Dismissal of Complaint

## Must Dismiss if:

- Would not constitute Title IX sexual harassment as is defined in the regulations.
- Did not occur in a School District education program or activity.
- Did not occur against a person in the U.S.

## May Dismiss if:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw formal complaint or allegations.
- Respondent is no longer enrolled or employed by the School District.
- Specific circumstances prevent the School District from gathering evidence sufficient to reach a determination.

# Dismissal Process

37

the school must promptly send written notice of the dismissal and the reason for dismissal to both parties simultaneously



Both parties have a right to appeal this decision



Must include appeal process in dismissal notice

# Providing Required Notice

- When a school begins an investigation, it must provide **both the complainant and respondent** with notice of:
  1. The school's Title IX grievance process
  2. Information on the informal resolution option

# Providing Required Notice

## Provide:

- ▶ Key details of alleged sexual harassment of incident (date/location; alleged misconduct; who was involved)
- ▶ Statement that the respondent is presumed not responsible and can only be found to be responsible at the conclusion of investigation process
- Statement that the parties are entitled to an advisor of their choice (*may but is not required to be an attorney*) and the right to inspect and review all evidence
- Must contain information regarding prohibition against providing false statements or providing false evidence

# Initial Notice

## Initial Notice must also contain:

- Initial Notice **must** be provided prior to the initiation of an investigation, and give respondent sufficient time to prepare before an investigatory interview



# Investigation

- ▶ Both parties must be given the opportunity to provide evidence, have access to an advisor, and participation of advisor for any meetings or hearings

# Investigation

- Provide written notice, including date, time, location, participants, and purpose of all hearings, **interviews**, or other meetings, with sufficient time for the party to prepare.
- Provide equal opportunity for parties and advisors to inspect and review evidence obtained by the school as part of its investigation if the information is directly related to the allegation raised in the formal complaint and a right to respond to the evidence

# Gathering Evidence

- ▶ Witness interviews and statements
  - ▶ Interview ALL relevant witnesses
- ▶ Review any video footage or any school based emails or computers
- ▶ Review any evidence provided by either party
  - ▶ E-mails, texts, social media
- ▶ May review outside reports if they are provided, but school does not otherwise have right to access such reports (medical report, police report, etc.)

# Relevant Evidence

44

- ▶ Evidence is relevant if:
  - ▶ It has any tendency to make a fact more or less probable than it would be without the evidence; and
  - ▶ The fact is of consequence in determining the action



# Relevant Evidence

## Relevant Information:

- Inculpatory evidence
  - Information that shows a person's involvement in an act or evidence that establishes guilt
- Exculpatory evidence
  - Evidence that shows a person's innocence

## Irrelevant information

- Information protected by privilege (attorney/client, medical)
- Questions about Complainants prior sexual behavior or sexual predisposition, unless its offered to provide someone other Respondent is responsible or offered to prove prior consent was provided (Rape Shield)

# Credibility Determinations

- Decision makers must make credibility determinations:
  - Observe the witness's demeanor
  - Note consistencies and inconsistencies
  - Consider biases or motive to lie
  - Probability or improbability of the statement of events



# Investigative Report

- Must be prepared after investigation
- Must summarize all steps taken during interview process
- Report cannot be issued until evidence sharing has occurred
  - Each party is given at least ten (10) days to respond to evidence in writing
  - If a written response to the evidence is provided, this must also be included in the investigation, and summary of such included in the report
- After these steps have occurred then report can be provided to the parties at least ten (10) days prior to the determination of any responsibility

# Decision Making

- The decision maker must:
  - Objectively weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations
  - Use independent judgement that is free from conflicts of interest or bias



# Decision

- Decision must be in writing and must include:
  - Portion of school's policy or policies that have been violated
  - Procedural steps taken to investigate and reach a decision
  - Finding of Fact
  - Conclusion section that relies on the facts and the relevant policy or policies (Policy 103)
  - Statement and rationale for determination of responsibility

# Decision

- Decision must include
  - Disciplinary sanctions that school will impose on respondent and remedies available to complainant to restore or preserve complainant's access to education
    - ▶ Remedies may include a one-way no-contact order that would prohibit participation in clubs and teams with the complainant

# Decision

- ▶ Decision Must Include:
  - ▶ A statement as to the rationale for any remedies for the complainant addressing how this remedies will restore or preserve equal access
  - ▶ A statement of the school's procedures, a statement that there is a right to appeal, and the permissible basis for appeal

# Decision

52

Must be sent to both parties simultaneously with information regarding how to appeal

- Must be in writing
- Must include name and contact information of appeal officer (cannot be Title IX coordinator, investigator, or decision-maker)

A decision is final if parties do not appeal or at the conclusion of the appeal process

- School has discretion to set appeal deadlines

Title IX Coordinator is responsible for ensuring remedies stated within decision are carried out

# Appeal

- ▶ Either party is entitled to appeal:
  - ▶ A final determination
  - ▶ A Dismissal of the formal complaint
  - ▶ Dismissal of any allegation in the formal complaint



## Basis for Appeal

A procedural irregularity affecting the outcome of the complaint

New evidence that was not reasonably available at the time of the determination that could affect the outcome

The Title IX Coordinator, Investigator(s) or decision maker had a conflict of interest or bias that affected the outcome

# Appellate Decision Maker

55

Different person from Title IX Coordinator, Investigators or decision makers

Must be trained

Must be free from conflict or bias

# Appeal Process

If party files an appeal, both parties are notified in writing



```
graph TD; A[If party files an appeal, both parties are notified in writing] --> B[Both parties have opportunity to submit a written statement supporting or challenging outcome]; B --> C[After reviewing written statements Appellate Decision-Maker must issue a written statement affirming or overturning the decision-maker's decision]; C --> D[Following this written response, the decision is final];
```

Both parties have opportunity to submit a written statement supporting or challenging outcome

After reviewing written statements Appellate Decision-Maker must issue a written statement affirming or overturning the decision-maker's decision

Following this written response, the decision is final